In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 381

NORTHWESTERN PACIFIC RAILROAD COMPANY,
APPELLANT

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a judgment (J.S. 10a) of a three-judge district court dismissing appellant's suit to set aside an order of the Interstate Commerce Commission. The order of the Commission (J.S. 19a), entered in *Northwestern Pac. R. Co. Abandonment*, 320 I.C.C. 19, denied appellant's application for authority to abandon approximately two and one-half

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miles of its main line of railroad. Abandonment of this segment was sought as a result of destruction by fire of a tunnel in 1961 and, if approved, would have severed over 95 percent of appellant's main north-south line from both a branch line and the main line's southern terminus at Tiburon on the northern shore of San Francisco Bay. Traffic is interchanged with the Atchison, Topeka and Santa Fe at Tiburon for movement from and to the Bay area and beyond. Traffic from appellant's northern segment destined for the San Francisco terminal area and beyond has, since destruction of the tunnel, been routed over appellant's lines to Schellville, where interchange is made with appellant's parent, the Southern Pacific Company.

The abandonment application was opposed by affected shippers and communities, the State and Public Utilities Commission of California, and the Santa Fe. After a full hearing, the examiner wrote a report (J.S. 21a–35a) in which he weighed the possible cost to appellant of the resumption of operations (and the resultant possible burden on interstate commerce) against the present and prospective loss to the general public, shippers, and other carriers, resulting from abandonment. He concluded, on the basis of appellant's own evidence, that it would realize net revenues from continued operations through the tunnel sufficient to justify reconstruction and resumption of service, and that such action, therefore, would cast no burden upon interstate commerce (J.S. 28a, 33a–34a). On the other hand, the examiner found that the public, the shippers, and the area railroads as a group were

suffering specific and heavy losses from the *de facto* abandonment pending rebuilding of the tunnel, which losses would continue in the future if permission to abandon were granted (J.S. 31a, 34a).

The Commission, Division 3, adopted the examiner's findings and agreed with his conclusion (J.S. 12a) that appellant had not shown, as required by Section 1(18) of the Interstate Commerce Act, 49 U.S.C. 1(18), that the present and future public convenience and necessity permit the abandonment. The Commission concluded: "Reconstruction of the tunnel will not result in an undue burden upon interstate commerce or upon applicant. When the question to be resolved is a matter of only the degree of profits by the railroads on the one hand as against a loss by the shipping public through fewer facilities for rail transportation and a less efficient, slower service, it must be resolved in favor of the public" (J.S. 19a). Accordingly, the application to abandon was denied.

The three-judge district court unanimously sustained the Commission's decision (J.S. 1a–10a). It reviewed the entire record, and held that the Commission's findings were supported by substantial evidence (J.S. 10a).

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court:

Here, as in the court below, appellant relies upon the "constitutional fact" doctrine of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287, and argues that, because it asserted an unconstitutional confiscation of property, the district court erred in

not making an independent judgment on the facts (J.S. 3, 9). Putting to one side questions concerning the vitality of that doctrine (see, 4 Davis, *Administrative Law*, § 29.09, pp. 167, 180), it is clear that "the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the [agency's] power unless confiscation is clearly established." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53.

The court below found the claim of confiscation to be without substance here (J.S. 6a). It affirmed the Commission's finding (J.S. 19a, 28a, 33a–34a) that reconstruction of the tunnel and resumption of service would actually produce a net profit for appellant (J.S. 8a). Indeed, appellant Northwestern Pacific would actually suffer net losses from the abandonment: the beneficiary of abandonment would be its parent, the Southern Pacific. The Commission found that this result would flow from the alternate route interchange of traffic with the Southern Pacific at Schellville, rather than with the Santa Fé via the tunnel at Tiburon (J.S. 13a, 17a). Clearly, there is no force to appellant's contention that it is confiscatory for the Commission, by ordering restoration of the tunnel, to require Northwestern Pacific to accept the profits resulting from operation via Tiburon and interchange with the Santa Fe, even though this results in lesser profits to its parent, the Southern Pacific.

Appellant's remaining arguments—reflected in its statement of the "Questions Presented"—rest largely upon factual assertions contrary to the express findings of the Commission and the court below. For

example, it is repeatedly asserted that the Commission erred in looking "only to the past revenues and business, not the future potential" (J.S. 7). But, after considering such factors as continuing shipper need for the rail service, the inadequacy of substitute modes (J.S. 16a, 31a), and the greater efficiency for future traffic of the route sought to be abandoned as compared to the remaining alternate route (J.S. 16a–17a, 29a–30a), the Commission specifically found that the surrounding area "will in the foreseeable future generate sufficient traffic and revenues to support the [tunnel] restoration program and the continued through service" (J.S. 19a, 32a).[1] Upon review of the Commission's action, the court below concluded that there was substantial evidence to support the finding that "no long-run losses would be incurred by plaintiff in its over-all system" (J.S. 10a).

The Commission performed its duty to find the facts, draw the inferences, and balance the respective interests and then arrived at a determination that abandonment would not be consistent with the public convenience and necessity. 49 U.S.C. 1(18); *Colorado* v. *United States*, 271 U.S. 153, 166–169. "Bearing in mind the tests enunciated in *Universal Camera Corp.*

[1] Although appellant asserts that the cost of rebuilding the tunnel would exceed the previous two years' net revenue for the entire railroad (J.S. 9), a more meaningful measure of this cost is the net return to be expected on this investment. The record shows that the cost of reconstruction is $851,655, less $200,729 insurance payment, or a net cost of $650,935 (J.S. 13a). At 1960 and 1961 levels, net profits on operations through the tunnel were $101,656 and (on a twelve-month basis) $92,340, respectively, which would be approximately a 16% and 14% net return on capital invested (J.S. 17a).

v. *National Labor Relations Board*, 340 U.S. 474," (J.S. 10a), the district court reviewed the record and concluded that the findings of the Commission were adequately supported by substantial evidence. There is no occasion for further review of these factual issues. *Radio Corporation of America* v. *United States*, 341 U.S. 412; *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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